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No. 76-1048

In the Supreme Court of the United States

OCTOBER TERM, 1976

75.81 ACRES OF LAND, MORE OR LESS, SITUATE IN GRAYSON COUNTY, VIRGINIA, CLYDIE JOHNSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

RAYMOND N. ZAGONE,
CARL STRASS,
GLEN R. GOODSELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The district court issued no opinion. The district court's order is reproduced in petitioners' appendix at pages 32 through 38. The unpublished opinion of the court of appeals is reproduced in petitioners' appendix at pages 38 through 42.

JURISDICTION

The judgment of the court of appeals, omitted from the appendix, was filed on November 2, 1976. The petition for a writ of certiorari was filed on January 31, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the report of the federal condemnation commission in this case, issued under Rule 71A(h), Fed. R. Civ. P., met the standard of adequacy set forth in *United States* v. *Merz*, 376 U.S. 192.

STATEMENT

On April 17, 1974, the United States condemned approximately 75.81 acres of land near Troutdale, Virginia (Pet. App. 27, 30). The condemnation was made in connection with the public use of the Mt. Rogers National Recreation Area administered by the United States Forest Service.

A three-member Commission, appointed by the district court pursuant to Rule 71A(h), Fed. R. Civ. P., heard evidence at a hearing on the question of just compensation (Pet. App. 27). The government's valuation testimony ranged from $37,900 to $39,200, and the landowners' testimony ranged from $92,000 to $97,500 (Pet. App. 28-30). There was no dispute regarding the highest and best use of the property (Pet. App. 28) or about valuation technique or physical facts. The Commission also viewed the property (Pet. App. 34).

The Commission awarded $52,500 as just compensation for the subject tract (Pet. App. 30). After the Commission filed its report, the landowners filed exceptions thereto, which were overruled by the district court (Pet. App. 35). The district court then filed a final order that adopted the Commission's report and awarded the landowners $52,500 as just compensation (Pet. App. 32-38).

The court of appeals, in affirming the judgment below, held that although the basis for the award was not fully disclosed, it was well within the range of the evidence, and that the omission of a stated basis for the award did not render the report fatally defective under the standard of *United States* v. *Merz*, 376 U.S. 192 (Pet. App. 38-42).

ARGUMENT

Although the report of the Federal Condemnation Commission in this case does not discuss in detail the reasoning behind its finding on valuation, we do not believe that this case merits further review.

Petitioners' principal argument is that this case conflicts with *United States* v. *Merz*, 376 U.S. 192. In *Merz*, this Court set out at length the standard of responsibility of a Federal Condemnation Commission in cases of this type (376 U.S. at 198-199):

> Conclusory findings are alone not sufficient * * *. The commissioners need not make detailed findings such as judges do who try a case without a jury. Commissioners, we assume, will normally be laymen, inexperienced in the law. But laymen can be instructed to reveal the reasoning they use in deciding on a particular award, what standard they try to follow, which line of testimony they adopt, what measure of severance damages they use, and so on. We do not say that every contested issue raised on the record before the commission must be resolved by a separate finding of fact. We do not say that there must be an array of findings of subsidiary facts to demonstrate that the ultimate finding of value is soundly and legally based. The path followed by the commissioners in reaching the amount of the award can, however, be distinctly marked.

Whether a path has been sufficiently marked will necessarily depend on the circumstances of each individual case.

The report in this case, while containing no explicit explanation of the Commission's reasoning, does set forth with some particularity the material on which the valuation

figure was based.[1] Because the only dispute was over the value itself, the Commission in the final analysis had only to weigh the "informed guess" of each expert. *United States* v. *Miller*, 317 U.S. 369, 375. The Commission thus was in the position of a jury confronted by conflicting evidence, with the duty of assessing credibility and arriving at an award within the range of the witnesses' testimony. See *United States* v. *Evans*, 380 F. 2d 761 (C.A. 10); *Chandler* v. *United States*, 372 F. 2d 276 (C.A. 10). The Court of Appeals for the Seventh Circuit recently observed (*United States* v. *573.88 Acres in Crawford, Dubois, and Orange Counties, Ind. (Patoka Lake)*, 531 F. 2d 847, 849:

> In the appellate decisions since *Merz* it is clear that the commissioners are not required to explain the exact thought processes they utilized nor are they required to develop and apply a mathematical formula which can be programmed, computerized and then reviewed by the district court like an algebraic equation.
>
> * * * * *
>
> Weighing the conflicting testimony presented by various experts is a difficult task but it is a permissible means or "path" in determining an award.[2]

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[1]The report sets forth the following information: (1) a description of the appearance, location, and terrain of the subject tract, (2) a specific finding of its highest and best use for recreational purposes (which was not disputed below), (3) a statement that the government's witness introduced comparable sales before the Commission with a summary of the range of values on a per-acre basis, (4) a statement of the range of fair market values to which government witnesses testified, (5) a summary of the testimony of the landowners' witnesses, including the range of fair market values testified to by them, (6) a statement that the Commission was relying upon this evidence, the instructions, their view of the tract and the comparable sales in arriving at the award, and (7) a finding of the fair market value of the tract which was within the range of the evidence.

[2]Petitioners contend that this case is in conflict with the decision of the Third Circuit in *Government of Virgin Islands* v. *2.6912 Acres of Land*, 396 F. 2d 3. There is, however, no indication that the commissioners here used their own expertise or failed to act like a deliberative body applying constitutional standards.

We do not suggest that the adequacy-of-report question is not recurring or unimportant in light of the vast federal acquisition program; its costs in terms of money and time to the judiciary, landowners, and the government; and the increasing number of condemnation cases referred to commissioners. Nor do we profess that the *Merz* guidelines in application have generally produced meaningful, judicially reviewable reports; the government has itself frequently complained to the federal district and appellate courts that *Merz* is being ignored. See, *e.g.*, *United States* v. *573.88 Acres in Crawford, Dubois, and Orange Counties, Ind. (Patoka Lake)*, *supra*. But the failure of the Commission in this case to make more detailed findings does not so depart from the standard set forth in *Merz* as to warrant correction by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

RAYMOND N. ZAGONE,
CARL STRASS,
GLEN R. GOODSELL,
Attorneys.

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